IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

RALPH VANZANT, et al.	:	
	:	
Plaintiff	:	**Case No. 1:10-CV-00596**
	:	
vs.	:	**Judge Susan J. Dlott**
	:	
JENNIFER BRUNNER	:	
OHIO SECRETARY OF STATE	:	
	:	
Defendant.	:	

DEFENDANT OHIO SECRETARY OF STATE JENNIFER BRUNNER'S MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

I. INTRODUCTION

Ohio law permits any qualified elector to vote by absentee ballot (a process also referred to as early voting). The purpose of the law is to expand participation in voting. Consistent with that goal, some counties have taken the additional step of paying the postage for electors to mail their ballot application forms, their ballots, or both, to the county board of elections. Rather than applaud this innovation, Plaintiffs are seeking an injunction, the effect of which would be to suppress voting, impose dramatic costs on cash-strapped counties, and potentially create chaos in the election.

The Equal Protection Clause of the Fourteenth Amendment does not, indeed, *cannot*, compel absolute uniformity of treatment in every facet of life. "[U]navoidable inequalities in treatment, even if intended in the sense of being known to follow ineluctably from a deliberate policy, do not violate equal protection." *Griffin v. Roupas*, 385 F.3d 1128, 1132 (7th Cir. 2004) (quoting *Apache Bend Apartments, Ltd. v. U.S. Through I.R.S.*, 964 F.2d 1556, 1569 (5th Cir.

1992)). The decision by some county boards of elections to pay the postage for voters to submit absentee ballots and/or absentee ballot applications in no way disenfranchises voters, nor does it implicate any constitutional protections. It is simply one of life's "unavoidable inequalities in treatment." The State can no more ensure absolute uniformity of all voting conditions than it can ensure comparable weather in all precincts. Plaintiffs can prevail on neither an Equal Protection nor a Due Process claim, and therefore the request for injunctive relief should be denied.

II. STATEMENT OF FACTS

Ohio law permits any qualified elector to vote by "absent voter's" ballot. R.C. 3509.02(A). The process for obtaining an absent voter's ballot works as follows: a person who wishes to vote an absent voter's ballot must make a written request to the county director of elections. R.C. 3509.03. Upon receipt of such a request, the director, after confirming that the requesting party is in fact a qualified elector, must deliver the ballot, by mail or hand delivery, to the elector. R.C. 3509.04. The elector marks the ballot, and then returns it by mail or hand delivery, to the board of elections within the time allowed by law. R.C. 3509.05.

In the interest of making voting easier, some counties are taking affirmative steps to promote absentee voting in the upcoming November 2, 2010 election:

* On August 24, 2010, the Franklin County Board of Elections mailed applications for absentee ballots to all 637,980 registered electors in the county. [Plaintiffs' Exhibit A, Declaration of Matthew Damschroder, ¶ 3].

* The Cuyahoga County Board of Elections intends to mail applications for absentee ballots to all qualified electors in the county. Along with the applications, Cuyahoga will include a postage-paid envelope for the elector to return the application to the Board of Elections. [Plaintiffs' Exhibit B, Declaration of Robert S. Frost, ¶¶ 3-4].

* The Madison County Board of Elections intends to mail applications for absentee ballots to all qualified electors in the county. Madison County intends to pre-pay the postage for the elector to return the application to the Board of Elections. [Plaintiffs' Exhibit D, Declaration of Tim Ward, ¶¶ 3-4].

* The Hamilton County Board of Elections intends to mail applications for absentee ballots to all qualified electors in the county. Unlike Cuyahoga and Madison Counties, Hamilton County will not pay the postage for the elector to return the absent voter application. [Plaintiffs' Exhibit C, Declaration of Alex Triantafilou, ¶¶ 3-4].

* Montgomery County intends to mail applications for absentee ballots to all qualified electors in the county. [Plaintiffs' Exhibit E, Declaration of Greg Gantt, ¶ 3].

* At least three counties are not proactively mailing absent voter ballot application forms to all qualified electors or paying the postage costs for electors to submit applications: Butler County; Highland County; and Lawrence County. [Plaintiffs' Exhibit F, Declaration of Tom Ellis; Exhibit G, Declaration of Kay Ayres; and Exhibit H, Declaration of Catherine Overbeck].

The counties also differ as to whether they will pay the postage for the elector to mail in the absent voter's ballot itself: Franklin and Cuyahoga Counties are sending postage pre-paid envelopes along with each ballot. [Exhibits A, ¶ 4 and Exhibits B, ¶ 5]. Hamilton, Montgomery, Butler, and Highland are requiring electors to pay their own postage to mail in absentee ballots. [Exhibits C, E, F, and G]. And splitting the difference, Lawrence County will not pre-pay the postage, but if a ballot arrives with insufficient postage, the Lawrence County Board of Elections will pay the deficiency. [Exhibit H, ¶ 5].

The question for this Court is whether these different methods of facilitating early voting

constitute an Equal Protection or Due Process violation, and if so, what remedy should the Court fashion.

III. LAW AND ARGUMENT

Before issuing a motion for preliminary injunction, the Court must examine four factors:

(1) Whether the movant has a "strong" likelihood of success on the merits;

(2) Whether the movant would otherwise suffer irreparable injury;

(3) Whether a preliminary injunction would cause harm to others; and

(4) Whether the public interest would be served by the issuance of a preliminary injunction.

McPherson v. Michigan High Sch. Athletic Ass'n, 119 F.3d 453, 459 (6th Cir. 1997) (en banc); *Cabot Corp. v. King*, 790 F. Supp 153, 155 (N.D. Ohio 1992). The standard for granting a preliminary injunction is more "stringent" than that required for summary judgment. *Leary v. Daeschner*, 228 F.3d 729, 739 (6th Cir. 2000). This is because "the preliminary injunction is an 'extraordinary remedy involving the exercise of a very far-reaching power, which is to be applied 'only in [the] limited circumstances' which clearly demand it." *Id.* (quoting *Direx Israel, Ltd. v. Breakthrough Med. Corp.*, 952 F.2d 802, 811 (4th Cir. 1991)) (internal quotations omitted). While the failure to establish any single one of the four elements is enough to prevent such an extraordinary remedy from issuing, Plaintiffs have failed to meet any of the four prongs in the case at bar.

A. Plaintiffs Cannot Demonstrate a Strong Likelihood of Success on the Merits.

1. The Proper Standard of Review Is "Rational Basis"

As a preliminary matter, in order to determine the likelihood of Plaintiffs succeeding on the merits, the Court must articulate the standard of review it will apply to the state actions under challenge. Rather than opine on the question, Plaintiffs attempt to cover all their bases by

arguing the early voting procedures serve no compelling state interest, lack any substantial relationship to an important state interest, and also are not rationally related to any legitimate state interest. (R. 3, Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction. 14).

State actions which expand the franchise, rather than infringe on voting rights, are presumed to be constitutional, and will be upheld so long as the distinctions they draw bear some rational relationship to a legitimate state end. *McDonald v. Board of Election Comm'rs*, 394 U.S. 802, 807-09 (1969). *Bush v. Gore*, 531 U.S. 98 (2000), the case upon which Plaintiffs' chiefly rely, did not change this rule; in fact, the Supreme Court in *Bush* did not discuss any level of applicable scrutiny. *Paralyzed Veterans of Am. v. McPherson*, 2008 U.S. Dist. LEXIS 69542 (Sept. 9, 2008 N.D. Cal.) at *53 (quoting *Common Cause Southern Christian Leadership Conference of Greater Los Angeles v. Jones*, 213 F. Supp.2d 1106, 1109 (C.D. Cal. 2001)). However, subsequent cases (to the extent they are willing to apply *Bush v. Gore* at all[1]) have held that *Bush* applied the lowest level of scrutiny to the 14th Amendment claims presented in that case. *Paralyzed Veterans of Am. v. McPherson*, supra; *Gustafson v. Illinois Board of Elections*, Case No. 06-C-1159, 2007 U.S. Dist. LEXIS 75209 (Sept. 30, 2007, N.D. Ill.).

2. Plaintiffs' Cannot Prevail On Their Equal Protection Claim

The claim in this case is not unique; an identical Equal Protection challenge to the manner of implementing early voting was rejected in *Gustafson v. Illinois Board of Elections*, 2007 U.S. Dist. LEXIS 75209 (Sept. 30, 2007, N.D. Ill.). The District Court provided a comprehensive analysis of the pertinent law, which makes the opinion a useful starting point.

[1] Many courts take seriously the admonition in *Bush* that the decision has no application beyond its own unique facts and circumstances. See, e.g., *Wyatt v. Dretke*, 165 Fed.Appx. 335, 340 (5th Cir. 2006)(per curiam) (unpublished) ("on its face, the *Bush v. Gore* holding is limited to the facts at issue there – the 2000 presidential election") cert. denied sub nom. 548 U.S. 932 2006); *Walker v. Exeter Region Co-op Sch. Dist.*, 157 F.Supp.2d 156, 159 n.6 (D.N.H. 2001), aff'd, 284 F.3d 42 (1st Cir. 2002).

Gustafson involved a challenge to the manner in which various county election boards were implementing Illinois' early voting law. Some counties offered early voting exclusively at one location, while other counties held polling at multiple sites. Two counties (Kane County and Rock Island County) operated mobile trolleys or "votemobiles" that moved to different sites around the county. One county (and the City of Peoria) mailed early voting notices to voters, while the other counties relied upon newspapers, websites, and signs at polling places to alert voters to the availability of early voting. The plaintiffs filed suit against the Illinois State Board of Elections, alleging that as a result of the wide variations in early voting availability, some voters had greater access to the polls than others (the same argument posited by Plaintiffs herein). By tolerating such differences, the *Gustafson* plaintiffs argued, the State was denying equal protection to its citizens.

As with Ohio's early voting law, the objection to Illinois' law was not what the statutory language commanded, but rather what it lacked, namely, any terms restricting the counties from implementing early voting in the ways they saw fit. *Gustafson* is best understood as a two-step inquiry: first, is the statute as written constitutional and second, if so, was it constitutionally proper for state officials to take no action once they saw divergent implementation schemes?

The District Court easily answered the constitutional challenge to the statute as written. The plaintiffs maintained the Illinois law was unconstitutional on its face because it "provide[d] no protections to ensure that the early voting right [would] be apportioned between different districts so as to ensure equal protection." But that formulation misstated the test. The statute was neutral on its face; its obvious purpose was to expand the availability of voting, and nothing in the statute itself manifested an intention to discriminate based on race, class, or geography. Likewise, however Plaintiffs feel about the manner in which the Ohio County Boards are

implementing early voting, they must concede that R.C. 3509.01 *et seq*. is neutral on its face.[2]

The remaining question, therefore, was whether the State Board of Elections was justified in allowing this situation to persist. The key to the District Court's analysis was the understanding that the law in question was designed to expand, not limit, the franchise.

> Notably, the law in this instance does not remove the right to vote from any individual, and indeed expands the right for all Illinois voters. Plaintiffs argue that it expands the right for some more than others; however, this is an effect rather than a purpose of the law, and in any event goes toward questions of ease of voting rather than outright denial of any fundamental right.

Id. at * 30. The District Court sought guidance from the Supreme Court's decision in *McDonald v. Bd. of Election Commissioners of Chicago*, which affirmed the provision of absentee ballots to some groups but not others. The Supreme Court in *McDonald* noted that:

> It is thus not the right to vote that is at stake here but a claimed right to receive absentee ballots. Despite appellants' claim to the contrary, the absentee statutes, which are designed to make voting more available to some groups who cannot easily get to the polls, do not themselves deny appellants the exercise of the franchise; nor, indeed, does Illinois' Election Code so operate as a whole, for the State's statutes specifically disenfranchise only those who have been convicted and sentenced, and not those similarly situated to appellants.

394 U.S. 802, 807-8 (1969). Therefore, applying the Supreme Court's *Burdick* test,[3] the District Court found that the state's inaction imposed only a minimal burden on the plaintiffs' rights, and was thus permissible so long as it was "rationally related to a legitimate state interest." *Id*. (quoting *Hendrix v. Evans*, 972 F.2d 351 (7th Cir. 1992)). Stated differently, the burden rests with the plaintiff to show that "no set of circumstances exist under which the Act would be valid." *Id*. at * 32, (quoting *U.S. v. Salerno*, 481 U.S. 739, 745 (1987)).

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[2] *Gustafson* took the analysis a step farther: Given the neutrality of the statute, an Equal Protection claim could only prevail if the plaintiffs could show a disparate effect that was "so clearly foreseeable" that one could infer intent. The Court found that the plaintiffs were unable to present evidence of any discriminatory impact. In this case, the plaintiffs have not even alleged that the statute itself is unconstitutional, so the Court need not address this issue.

[3] *Burdick v. Takushi*, 504 U.S. 428, 433-34 (1992).

The State Board's decision to take no action passed muster for many reasons, including but not limited to the fact that the State Board could reasonably have assumed from the language of the statute that the Illinois legislature had made a conscious choice to allow each voting district to tailor its approach to early voting depending on its needs and abilities. *Id.* at * 33.

The logic of *Gustafson* translates easily to this case. Ohio's early voting statute is plainly intended to make voting more accessible, and does not (directly or indirectly) inhibit any qualified elector from casting a ballot. The actions taken by counties such as Madison and Cuyahoga, which provide pre-paid envelopes to return applications, ballots, or both, promote the legitimate goal of voter participation by making the process easier and cheaper for voters.

It is eminently reasonable for the Secretary to allow the counties to handle the distribution of absentee ballots differently, because the needs and abilities of the counties differ. Large, urban counties have a compelling interest in reducing congestion and long lines at polling places on November 2, and they have the financial resources to pay the postage for voters to mail in their ballots. (Increased use of early ballots also minimizes wear and tear on expensive voting machines and tends to result in fewer provisional ballots than in-person voting). Smaller counties, on the other hand, may either lack the money to pay voter postage, or simply deem it an unwise expenditure because long lines have not historically been a problem in those counties. The Equal Protection Clause does not mandate that the solution to one county's problems be applied in all counties.

Plaintiffs' Equal Protection claim is based primarily, if not exclusively, on the United States Supreme Court's ruling in *Bush v. Gore*, 531 U.S. 98 (2000). As the Court will certainly recall, the question in *Bush* was whether manual recounts of votes cast in the 2000 election in some but not all Florida counties, applying different standards to determine voter intent, violated

equal protection. What concerned the majority in that case was the absence of any standards governing what constitutes a "vote." This case does not concern the substantive question of what constitutes a vote, but rather deals with the procedures employed by the county for conducting the voting, and in that arena, states are given great leeway to enact reasonable, even-handed legislation to ensure that elections are carried out in a fair and orderly manner. *Storer v. Brown*, 415 U.S. 724, 730 (1974); *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983).

Plaintiffs' reliance on the Ohio Supreme Courts decision in *State ex rel. Skaggs v. Brunner*, 120 Ohio St.3d 506 (2008) is misplaced for exactly the same reason. The problem identified by the Supreme Court in *Skaggs* was the same as in *Bush v. Gore*: counties applying different standards to determine what constitutes a valid vote. The specific issue in *Skaggs* was that some counties were counting provisional ballots as valid votes even though they were lacking certain signatures on the ballot envelope, whereas other counties would not count the provisional ballot unless all the signatures were in order. The facts were different from *Bush*, but the motivating principle was the same.

Finally, Plaintiffs point to the District Court opinion in *League of Women Voters of Ohio v. Blackwell*, 432 F.Supp.2d 723 (N.D. Ohio 2005), even though that decision was reversed in part by the Sixth Circuit. 548 F.3d 463 (6th Cir. 2008). In that case, the League alleged that Ohio had systemically misallocated voting machines, causing some voters as long as twelve hours to vote, as a result of which, many people simply gave up and went home. The League also alleged that poorly-trained poll workers gave erroneous instructions, sending voters to the wrong precincts and causing provisional ballots to be rejected. And the League alleged that disabled voters were turned away from the polls, and voting machines malfunctioned by registering votes for a candidate other than the one selected. These allegations share a common

element: disenfranchisement. State action that systemically causes votes not to be counted, or puts an obstacle between some voters and a place in the polling booth, creates a potential Equal Protection problem. But as noted above, Ohio's early voting statute does not disenfranchise anyone. Making it easier for some people to cast a vote is not the same thing as making it harder for some people to vote. (*League* is also distinguishable because the only issue was whether the plaintiffs had stated a claim that could survive a Rule 12(B) motion to dismiss; here, the question is not whether the Complaint states the elements of a claim, but whether that claim has a substantial likelihood of success on the merits, a completely different inquiry).

Based on the clear law, as set forth above, Plaintiffs cannot show any likelihood of success on their Equal Protection claim, and so the motion for injunctive relief should be denied.

3. Plaintiffs Cannot Prevail On Their Due Process Claim

Alternatively, Plaintiffs seek relief under the Due Process Clause of the 14th Amendment. It is certainly true that the Due Process Clause may be implicated "in the exceptional case where a state's voting system is fundamentally unfair." *League of Women Voters*, 548 F.3d at 478 (citing *Griffin v. Burns*, 570 F.2d 1065, 1078-79 (1st Cir. 1971)). For example, due process may be implicated if a state employs non-uniform rules, standards and procedures that result in significant disenfranchisement and vote dilution, or if the state significantly departs from previous state election practices. *Warf v. Bd. of Elections*, Case No. 09-5265, 2010 U.S. App. LEXIS 18231, 2010 FED App. 0279P (Sept. 1, 2010 6th Cir.) at * 12-13 (citations omitted). But this is hardly that exceptional case.

Plaintiffs contend that Ohio's early voting "violates due process because it leads to a system of fundamental unfairness." [R. 3, Plaintiffs' Memorandum, p. 14]. This statement conflates two separate Due Process allegations. "A claim that the election process is

fundamentally unfair disenfranchises **all** voters, not just a segment of the population differentiated by age, or race, or some other characteristic." *McClafferty v. Portage County Bd. of Elections*, 661 F. Supp. 2d 826, 838, n.11 (N.D. Ohio. 2009) (emphasis added). For example, in *Caruso v. Yamhill County*, 422 F.3d 848 (9th Cir. 2005), cert. denied, *Caruso v. Oregon*, 547 U.S. 1071 (2006) (a case relied upon by Plaintiffs), the appellate court held that there could be a substantive due process violation if the ballot language was so misleading as to deceive the voters in general about the subject of the measure under consideration.[4]

Perhaps the quintessential example of fundamental unfairness and widespread disenfranchisement is *Ury v. Santee*, 303 F.Supp. 119 (N.D. Ill. 1969). The First Circuit Court of Appeals summarized the facts of *Ury* as follows:

> Two months before the scheduled town election, the incumbent trustees quietly proposed and passed an ordinance reducing the number of voting precincts from 32 to 6. When election day arrived, these precincts turned out to be entirely inadequate to the number of electors wishing to vote. Traffic jams ensued, people waited hours to reach the polls, some were forced to vote outside of voting booths, people in populous precincts could not vote, and other problems arose. Though the precise number of voters turned away was incapable of calculation, the federal court invalidated the entire confused election, holding that due process and equal protection deprivations had been made out by the plaintiff class of 'all registered voters in Wilmette' in that 'hundreds of voters were effectively deprived of their right to vote'" and that voters in populous districts were discriminated against, with the effect either of changing the election results or rendering the results doubtful.

Griffin v. Burns, 570 F.2d at 1077-78. Obviously, nothing alleged in this case is remotely comparable to the circumstances in *Ury*. Simply stated, the "fundamental unfairness" line of substantive due process cases is irrelevant because the Plaintiffs have not alleged general disenfranchisement of all voters.

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[4] Ironically, the Ninth Circuit in *Caruso* rejected the substantive due process claim, finding that the ballot language would not have "infected the entire election with patent and fundamental unfairness." 422 F.3d at 863-64 (quoting *Burton v. Georgia*, 953 F.2d 1266, 1271 (11th Cir. 1992)).

Rather, Plaintiffs are attempting to articulate a second form of due process claim: voter dilution. The concept of vote dilution as a constitutional injury has its roots in reapportionment cases where the Supreme Court held that malapportionment caused some votes to weigh less than other votes. *Dudum v. City & County of San Francisco*, Case No. C-10-00504, 2010 U.S. Dist. LEXIS 47020, at * 15-16 (April 16, 2010, N.D. Ca.) (citing *Reynolds v. Sims*, 377 U.S. 533 (1964)). However, the principle of "one man, one vote" which underlies the "vote dilution" jurisprudence, extends beyond apportionment cases, because "having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another." *Bush v. Gore*, 531 U.S. 98, 104-05 (2000).

The reason *Bush v. Gore* presented a possible vote dilution problem is that Florida counties were applying inconsistent standards to determine *what actually constituted a valid vote*. The Florida Supreme Court had held that a "legal vote" was one in which there was a "clear indication of the intent of the voter," *Gore v. Harris*, 772 So.2d 1243, 1261-62 (Fla. 2000), but never explained what would or would not constitute "a clear indication" of the voter's intent. Lacking a uniform state standard, each county applied its own rules. More lenient counties certified more votes than did counties that applied more exacting standards, such that the more lenient counties exerted greater voting strength than their population would otherwise have suggested.[5] The Supreme Court held Florida had created a system of "uneven treatment" that resulted in the debasement of votes statewide.

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[5] Broward County used more lenient guidelines, and as a result, certified as valid votes three times the number of "undervotes" as were counted in Palm Beach County, causing Broward County voters to have greater voting strength than Palm Beach County voters. The election boards in Broward, Miami-Dade, and Palm Beach counties all included so-called "overvotes" in their tallies, which gave those counties greater voting strength that the other 64 Florida counties, which disallowed approximately 110,000 overvotes. And Miami-Dade arguably increased its strength relative to other counties by including in its certified total votes authenticated during a partial recount, which the other counties did not do.

Bush v. Gore is plainly inapposite: no one is disputing the validity of the absentee ballots in this case, or proposing inconsistent standards for certifying absentee ballots as valid votes. Nor is this a case in which some voters get preferential access to the ballot due to racial discrimination in violation of the Voting Rights Act. Plaintiffs have identified no authority for the proposition that counties unlawfully increase their electoral power and dilute votes in other counties by improving the efficiency or ease of voting. Therefore, Plaintiffs have no likelihood of success on the merits of their Due Process claim, so their motion for injunctive relief should be denied.

B. Plaintiffs Failed To Establish That They Will Suffer Any Injury At All, Let Alone Irreparable Injury.

The allegation of irreparable harm is purely speculative. Plaintiffs do not explain how, let alone muster proof that the actions they complain of "threaten of impair [their] constitutional right to vote." [R. 3, Plaintiffs' Memorandum, p. 16]. Plaintiffs are not being blocked from voting or denied the ballot. As for a claim of vote dilution, a showing of irreparable harm would require evidence that the *total* vote in Franklin or Madison Counties is in excess of what would have occurred in the absence of pre-paid postage, such that the vote in those counties disproportionately dwarves the vote in Lawrence or Highland County. It is not sufficient, by the way, simply to show that the number of absentee votes increases as a result of pre-paid postage, since an unknown number of those electors would still have voted absentee, or in person on election day, had the board of elections not pre-paid their postage. A claim of voter dilution should also be able to present some evidence of how many voters were unable to vote as a result of the fact that they did not receive applications in the mail, with return postage paid. Plaintiffs need to submit evidence, not simply assume a constitutional deprivation.

C. The Issuance Of Injunctive Relief Will Cause Harm To Third Parties And Would Disserve The Public Interest.

The remedy Plaintiffs' seek would cause enormous hardship throughout the state. Plaintiffs' underlying theory is that all 88 counties need to implement early voting in exactly the same way. Athens County is not going to mail applications to all its qualified electors; Franklin County has already done so. How can the Court equalize the treatment of these two populations?

One possibility would be to rule that all counties must abide by what Athens County has decided: no mailing out applications. That means Franklin County would have to void the applications it has already sent out *as well as the signed applications that have already been returned to the board of elections.* Down that road lies confusion – eligible voters awaiting absentee ballots that never arrive – and voter suppression. And how would the Franklin County Board of Elections distinguish between an application it sent out in its mass mailing – which would be void – and an application that a voter picked up at the board of elections, filled out at home, and returned by mail? An order commanding Franklin County to back up and handle absentee ballots the same way as Athens or Highland County would create chaos and confusion and be impossible to obey.

Equally harmful would be an order that all counties meet the standards set by Franklin County. For example, it would cost $20,915.40 to send an absent voter application to every elector in Belmont County. [Defendant's Exhibit 1, Affidavit of William F. Shubat, ¶ 4]. Belmont County does not have adequate financial resources to mail applications to all electors. [*Id.*, ¶ 3]. Given its modest financial resources, the Belmont County Board of Elections has to choose between sending out applications or ensuring sufficient staffing for early voting and Election Day poll operations. [*Id.*, ¶ 5]. The same is true in Brown County, where the cost of mailing applications to all electors would be nearly $13,000. [Defendant's Exhibit 2, Affidavit

of Kathy Jones, ¶¶ 3-5]. Statewide, the total cost to mail an application for absent voter ballot to every qualified elector in the 88 counties would be $3,525,965.52. [Defendant's Exhibit 3, Affidavit of Veronica Sherman, ¶ 4]. The counties simply do not have money to make these mailings, and as the affidavits from Brown and Butler Counties make clear, if ordered to do so, elections officials would be forced to re-allocate money needed to conduct actual voting. Again, the result would be chaos and voter suppression.

Plaintiffs may simply abandon their claims with respect to the mailing of applications, and ask for relief to stop counties from pre-paying postage to return the ballots themselves – or an order compelling all counties to pay postage. The latter alternative has the same problem pointed out above, namely that it would impose tremendous costs on counties that barely have money to conduct the election as it is. And as for prohibiting all counties from pre-paying postage, such a ruling would transform the Equal Protection clause from a floor into a ceiling: it would make the poorest or least innovative county the standard to which every county must conform its conduct. The law does not demand such an outcome, nor should the courts wish to impose it.

Elections would be impossible if the courts demand absolute parity in all things among voters. Centralized polling places would be unlawful, because some voters live within walking distance of the polls while others have to travel by car many miles, possibly through heavy traffic. The Seventh Circuit captured the fundamental problem in *Griffin v. Roupas*, 385 F.3d 1128, 1132 (7th Cir. 2004):

> [W]hile the specific in-equality of which the plaintiffs complain could be eliminated if instead of drawing the line at the county boundary the law said that anyone who lives more than, say, 30 miles from his polling place can get an absentee ballot, this would be as coarse a rule as the county-line rule. The length of time it takes to cover 30 miles depends on road and traffic conditions that vary dramatically across the state. Moreover--and demonstrating the ubiquity of

> "discrimination" whenever lines have to be drawn--there is no relevant difference from the standpoint of hardship between a person who lives 29.9 miles from the polling place and a person who lives 30.1 miles from it. And how many people even know how many miles their home is from their polling place?

In the end, this entire Complaint is simply an objection to the fact that some voters are differently situated than others. This will always be the case, and the Constitution does not provide otherwise.

IV. CONCLUSION

For the aforementioned reasons, this Court should reject Plaintiffs' request for a temporary restraining order and preliminary injunction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing was filed electronically on this 13th day of September, 2010. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties of record.

/s/ Richard N. Coglianese
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